

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

In re: NEXIUM (ESOMEPRAZOLE)
ANTITRUST LITIGATION

MDL No. 2409

Civil Action No. 1:12-md-2409

This Document Relates To:

*United Food and Commercial Workers
Unions and Employers Midwest Health
Benefits Fund v. AstraZeneca AB, et al.*, 1:12-
cv-12203 (WGY)

*Allied Services Division Welfare Fund v.
AstraZeneca LP, et al.*, 1:12-cv-12263 (WGY)

*Fraternal Order of Police Miami Lodge 20,
Insurance Trust Fund v. AstraZeneca LP, et
al.*, 1:12-cv-12297 (WGY)

*New York Hotel Trades Council & Hotel
Association of New York City, Inc. Health
Benefits Fund v. AstraZeneca AB, et al.*, 1:12-
cv-12298 (WGY)

*Laborers International Union of North
America Local 35 Health Care Fund v.
AstraZeneca, L.P. et al.*, 1:12-cv-12362
(WGY)

*International Brotherhood of Electrical
Workers Local 595 Health and Welfare Fund
v. AstraZeneca, AB, et al.*, 1:12-cv-12378
(WGY)

*Laborers International Union of North
America Local 17 Health Care Fund v.
AstraZeneca LP et al.*, 1:12-cv-12383 (WGY)

International Union of Machinists and Aerospace Workers District No. 15 Health Fund v. AstraZeneca et al., 1:12-cv-12409 (WGY)

Michigan Regional Council of Carpenters Employee Benefits Fund v. AstraZeneca Pharmaceuticals LP et al., 1:12-cv-12412 (WGY)

A.F. of L. – A.G.C. Building Trades Welfare Plan v. AstraZeneca AB et al., 1:13-cv-10044 (WGY)

MAJORITY PLAINTIFFS’ UPDATE CONCERNING OUTSTANDING MOTIONS FOR APPOINTMENT OF LEAD COUNSEL FOR THE PROPOSED END PAYOR CLASS

After the status conference last Friday the Majority Plaintiffs discussed with Mr. Thomas Shapiro the potential resolution of the leadership issue. We were not, however, able to reach an agreement. This is particularly unfortunate, because counsel for Majority Plaintiffs would affirmatively welcome the addition of Mr. Shapiro, whom we know by experience and reputation as a highly skilled and committed advocate, as a fifth co-lead counsel. It is our understanding, however, that such a resolution is not acceptable to those with whom Mr. Shapiro is aligned.

In appointing lead counsel, the Court’s first priority is to ensure the appointment of counsel who will best represent the interests of the absent class members – the approximately 14,000 third-party payors and millions of individual consumers who constitute the proposed End Payor Class. Courts prefer the “private ordering” approach to appointment of lead counsel because, among other reasons, it brings to bear the collective experience and judgment of counsel as to who will best represent the interests of absent class members. *See Manual for Complex Litigation* (4th) § 10.224 (2004) (courts should consider the “attorneys’ ability to command the respect of their colleagues”); Third Circuit Task Force Report Selection of Class

Counsel, 208 F.R.D. 340, 417 (2002) (class benefits from the combined expertise and judgment of firms under the “private ordering” approach).

With respect to the argument that the clients represented by Messrs. Shapiro and Dugan should be represented among the leadership, we note that the focus of Rule 23(g)’s criteria is ensuring the proper representation of absent class members. The relative size of the proposed class representative is not among those criteria; indeed, the largest purchasers in an antitrust case frequently make the least attractive class representatives (for example, counsel for the direct purchaser class have never, in the last 15 years, proffered one of the “Big Three” wholesalers as a class representative). We respectfully submit that engrafting a “size of the client” criterion onto the Rule 23(g) analysis would cause significant substantive harm to future classes of antitrust plaintiffs.¹

This is recognized by other courts. For example, in one of the largest and highest profile recent antitrust cases, *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 2006 WL 2038650 (E.D.N.Y. Feb. 24, 2006), a coalition of firms, including as here the firms that first developed the case, supported a slate of co-lead counsel. Rejecting a later-filing firm’s argument that it should be appointed based in part on the magnitude of its client’s damages, the court held: “that [a particular plaintiff] may have a far greater individual damages claim than any other single plaintiff says nothing about who can best serve the interests of all plaintiffs.” *Id.* at *2. Appointing instead the coalition supported by the majority, the court noted that they “have already demonstrated their ability to work cooperatively with each other, with the court, and most importantly, with the numerous non-lead counsel representing plaintiffs with

¹ The same is true of the number of cases filed. It would be detrimental to the orderly prosecution of major antitrust cases to reward counsel who file multiple lawsuits in a bid to gain a leadership position.

very significant interests in this litigation. They have the support of a larger and more diverse group of clients. . . .” *Id.* Those are exactly the facts here, where the slate proposed by the Majority Plaintiffs has the support of every other plaintiff group, and the opposing slate has the support of no one else; and where counsel for Majority Plaintiffs worked cooperatively with direct purchaser plaintiff counsel and defense counsel in organizing the joint agenda for the Friday conference and, more broadly, have more than a decade of experience in working with both those sets of counsel in other antitrust cases.

In any event, each of the third-party payor clients represented among the Majority Plaintiffs has a very significant economic interest in this case. Each of those clients, including those represented by counsel who have agreed in the spirit of cooperation to forego a leadership position, has several thousand to more than 40,000 beneficiaries. As is evident from the papers seeking appointment as co-lead counsel, each of these firms – including again those who have agreed to forego a leadership position – satisfies the Rule 23(g) criteria for appointment to lead this case.

Finally, the Majority Plaintiffs assure the Court that our position is driven solely by our obligation to advocate the slate of co-lead counsel who, in our experience and judgment, can best represent this proposed class.

Dated: January 14, 2013

Respectfully submitted,

/s/ Glen DeValerio

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CERTIFICATE OF SERVICE

I, Glen DeValerio, hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants on January 14, 2013.

/s/ Glen DeValerio
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